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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 KATHY MCCOURT,

11 Plaintiff,

12 v.

13 OCWEN LOAN SERVICING, LLC, a
14 Delaware Limited Liability Corp.,

15 Defendant.

CASE NO. 11-cv-05863 JRC

ORDER ON MOTION TO DISMISS
AMENDED COMPLAINT

16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local
17 Magistrate Judge Rule MJR 13. (See also Joint Status Report, ECF No. 14; Order on Consent,
18 ECF No. 16.)

19 This matter comes before the court on Defendant's motion to dismiss pursuant to Fed. R.
20 Civ. P. 12(b)(6) and has been fully briefed. (See ECF Nos. 7, 10, 13, 15). After considering and
21 reviewing the record, the undersigned finds that plaintiff has alleged sufficient facts under a
22 cognizable legal theory on some, but not all, of the causes of action asserted. For those claims
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1 that are factually deficient, defendant's motion is granted without prejudice so that plaintiff is
2 given another opportunity to file additional claims, if appropriate.

3 PROCEDURAL BACKGROUND

4 After plaintiff filed her initial complaint in Clark County Superior Court, defendant filed
5 a notice of removal in this court (ECF No. 1). Instead of answering the complaint, defendant
6 filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 7). Thereafter, plaintiff
7 filed an amended complaint (ECF No. 8), and defendant filed a new motion to dismiss the first
8 amended complaint (ECF No. 10). Plaintiff responded (ECF No. 13), and defendant filed a reply
9 (ECF No. 15).

10 FACTUAL ALLEGATIONS

11 Plaintiff's material allegations in the complaint are taken as admitted for purposes of
12 ruling on a Fed. R. Civ. P. 12(b)(6) motion. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
13 555 (2007) (citations omitted). Therefore, for purposes of this motion only, the Court provides
14 the following summary of facts based on plaintiff's first amended complaint (ECF No. 8).

15 Plaintiff obtained a loan on or about January 8, 2007 from Decision One Mortgage Co.,
16 LLC, which had retained Saxon Mortgage Services, Inc. to service the loan. The loan is
17 evidenced by a note and deed of trust, which secures plaintiff's primary residence. All payments
18 were timely (ECF No. 8, ¶ 3). Although plaintiff is unaware of the beneficial owner of the loan,
19 plaintiff alleges that defendant Ocwen Loan Servicing, LLC began servicing the loan in
20 November of 2009 (id. at ¶ 4). Immediately after taking over the servicing of the mortgage,
21 defendant declared plaintiff to be in default for failing to pay the monthly payment (id. at ¶ 6).
22 In December of 2009, plaintiff contacted defendant to make clear that she had never missed a
23 payment and was not in default (id. at ¶ 7). Ever since that time, defendant has engaged in a
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1 repeated process of sending past due notices to plaintiff, charging interest on amounts that had
2 been paid, issuing notices of default, and failing to correct its accounting records to reflect that
3 plaintiff had made payment in a timely manner (see id. ¶¶ 8-13). Although plaintiff attempted to
4 communicate with defendant on numerous occasions, both orally and in writing, defendant
5 continued to state that her account was delinquent (id. at ¶¶ 11 – 17). At some point, defendant
6 refused to accept payments from plaintiff (id. at ¶ 18). Also, defendant reported to credit
7 reporting agencies that plaintiff was delinquent on her loan, which caused plaintiff damage to her
8 credit rating as well as “great emotional distress, anxiety, loss of sleep and physical symptoms.”
9 (Id. at ¶ 19.)

10 Plaintiff acknowledges that she did not submit a written request for correction to credit
11 reporting agencies under the Fair Credit Reporting Act (“FCRA”) (id. at ¶ 19).

12 Plaintiff has raised five causes of action and defendant has moved to dismiss all five
13 causes of action (ECF No. 8, ¶¶ 23 – 41). Those causes of action are:

- 14 1. Interference with a contractual relationship.
- 15 2. Violation of the Fair Debt Collection Practices Act (“FDCPA”).
- 16 3. Violation of the Fair Credit Reporting Act (“FCRA”).
- 17 4. Intentional and reckless infliction of severe emotional distress.
- 18 5. Violation of the Real Estate Settlement Practices Act (“RESPA”).

19 Each of these causes of action will be discussed below.

20 STANDARD OF REVIEW

21 Defendant may assert a Fed. R. Civ. P. 12(b)(6) motion prior to filing a responsive
22 pleading. A Fed. R. Civ. P. 12(b)(6) motion requires that the complaint be dismissed if plaintiff
23 has failed to state a claim on which relief can be granted.

1 A court should dismiss a claim under Fed. R. Civ. P. 12(b)(6) when there is either a lack
2 of a cognizable legal theory or an absence of sufficient facts alleged under a cognizable legal
3 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984) (citation
4 omitted).

5 For purposes of ruling on this motion, material allegations in the complaint are taken as
6 admitted and the complaint is construed in plaintiff's favor. See Sprewell v. Golden State
7 Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted). “While a complaint attacked by a
8 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation
9 to provide the grounds of his entitlement to relief requires more than labels and conclusions, and
10 a formulaic recitation of the elements of a cause of action will not do.” Twombly, supra, 550
11 U.S. at 55 (internal quotation marks and citations omitted). “Factual allegations must be enough
12 to raise a right to relief above the speculative level, on the assumption that all the allegations in
13 the complaint are true (even if doubtful in fact).” Id. (internal citations omitted). Plaintiffs must
14 allege “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. However, a
15 court need not accept as true unreasonable inferences or conclusory legal allegations cast in the
16 form of factual allegations. Sprewell, supra, 266 F.3d at 988_ (citation omitted); W. Mining
17 Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981) (citations omitted).

18 DISCUSSION

19 A. Interference with a contractual relationship.

20 To state a cause of action for interference with a contractual relationship, plaintiff must
21 plead the following elements: (1) the existence of a valid contractual relationship; (2) that
22 defendant had knowledge of that relationship; (3) that intentional inference inducing or causing a
23 breach or termination of the relationship; (4) that defendant interfered for an improper purpose or

1 used improper means; and (5) resultant damages. See Comodore v. Univ. Mich. Contractors,
2 Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (2006) (citation omitted).

3 Plaintiff has alleged sufficient facts for each of the elements of this cause of action.
4 Defendant contends that plaintiff has not alleged the existence of a contract or that defendant had
5 knowledge of said contract, but, as the Court has discussed already, plaintiff alleges that
6 defendant began servicing plaintiff's mortgage loan contract in November, 2009, see supra,
7 Factual Allegations section. (See also Amended Complaint, ECF No. 8, ¶¶ 3, 4.) Similarly,
8 defendant argues that plaintiff fails to allege a contract breach. However, plaintiff alleges that
9 defendant erroneously declared plaintiff to be in default on her contract with the lender, added
10 fees to the amounts due pursuant to said contract, deducted money from an escrow account for
11 such fees and ceased accepting payments on the contract as required by the contract. (See
12 Amended Complaint, ECF No. 8, ¶¶ 6, 11, 15, 16, 18). In addition, in another section of the
13 Motion to Dismiss, defendant argues that plaintiff has admitted that defendant "claims that the
14 loan arrived in default" (see Defendant's Motion, ECF No. 10, p. 8). Finally, although defendant
15 argues that plaintiff has failed to allege "improper purpose or improper means," paragraph 23 of
16 plaintiff's first amended complaint specifically alleges that the motive behind defendant's
17 actions is to increase payments for late fees and for "suspense payments." (Id., ¶ 23.) In order
18 for plaintiff's claim to survive defendant's motion, plaintiff is not required to prove these facts,
19 but merely to allege them with sufficient specificity as to state a cause of action. Therefore,
20 defendant's motion in regard to cause of action number 1 is hereby DENIED.

21 B. Violation of the Fair Debt Collection Practices Act ("FDCPA").

22 Defendant argues that a cause of action for violation of the FDCPA has not been alleged
23 properly because defendant is not a "debt collector," as that term is defined in 15 U.S.C.

1 §1692a(6), which defines a debt collector as someone who “regularly collects or attempts to
2 collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”
3 Defendant provides a string citation to a number of cases, which defendant claims stand for the
4 proposition that defendant is not a debt collector. (See ECF No. 10, Defendant’s Motion to
5 Dismiss Plaintiff’s First Amended Complaint, pp. 4-5.) Those cases are not directly on point, as
6 will be discussed below.

7 Plaintiff asserts that defendant is a “debt collector” under 15 U.S.C. §1692a(6)(F)(iii).
8 This section states that a “debt collector” does not include any person collecting or attempting to
9 collect any debt “which was not in default at the time it was obtained by such person.” Plaintiff
10 argues that because defendant has claimed the loan was in default at the time it took over the
11 loan, this section applies even though plaintiff disputes the alleged default. (ECF No. 13,
12 Plaintiff’s Response to Defendant’s Motion to Dismiss, pp. 7-8.) Plaintiff cites no authority for
13 this proposition.

14 In reviewing defendant’s cases, each of them is distinguishable. In Barbanti v. Quality
15 Loan Service Corp., 2007 WL 26775 at 2-*3, 2007 U.S. Dist. LEXIS 676 at *6 (E.D. Wash.
16 2007), in an unpublished decision, the court ruled that this same defendant, Ocwen Loan
17 Servicing, LLC, was not a “debt collector” because it was attempting to enforce a security
18 interest, rather than collect a debt. Here, plaintiff specifically alleges that defendant was
19 attempting to collect a debt, but disputes the debt was owed. In Rivera v. BAC Home Loans
20 Servicing LP, 2010 WL 275704, 2010 U.S. Dist. LEXIS 80294 at *3, *8-*9 (N.D. Cal. 2010),
21 plaintiff was alleging a violation of California’s Rosenthal Fair Debt Collectors Practice Act, Cal
22 Civ. Code §1788 *et. seq.* There is no discussion of the federal act, 15 U.S.C. §1692a *et. seq.* In
23 Holbrook v. Aurora Loan Services, LLC, 2010 WL 986794 at *5, 2010 U.S. Dist. LEXIS 25174
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1 at *17 (C.D. Cal. 2010) the court had before it a complaint in which plaintiff had failed to allege
2 that defendant was a “debt collector” within the meaning of the statute, and the facts indicated
3 that defendant was foreclosing on property, rather than collecting a debt. In Ines v. Countrywide
4 Home Loans, Inc., 2008 WL 2795875 at *3, 2008 U.S. Dist. LEXIS 88739 at *7 (S.D. Cal.
5 2008), the court again was evaluating a case in which the defendant was foreclosing on property
6 pursuant to a deed of trust, and therefore did not fit within the meaning of a debt collector under
7 the FDCPA. In Hulse v. Ocwen Federal Bank FSB, 195 F. Supp. 2d 1188, 1203 (D. Or. 2002),
8 again the court was dealing with a case in which defendant was attempting to foreclose on
9 property pursuant to a deed of trust, which the court specifically ruled was not collection of a
10 debt within the meaning of FDCPA. Defendant’s cases are unpersuasive. Here, plaintiff alleges
11 that defendant was attempting to collect on a debt that was not owed. The Act specifically
12 includes “debt collector(s)” who “regularly collects or attempts to collect . . . debts owed or
13 due or asserted to be owed or due from another.” Here, plaintiff states a FDCPA cause of action
14 and defendant’s motion to dismiss on this cause of action is DENIED.

15 C. Violation of the Fair Credit Reporting Act (“FCRA”).

16 Defendant states that plaintiff has failed to allege that it notified the consumer reporting
17 agency (“CRA”) of the dispute and that defendant failed to report back to the CRA the result of
18 the investigation (ECF No. 10, Defendant’s Motion to Dismiss Plaintiff’s First Amended
19 Complaint, p. 7). Plaintiff acknowledges that it failed to report the dispute to the CRA, but
20 claims she is excused from reporting the dispute because this would be futile. (See ECF No. 8,
21 First Amended Complaint, ¶ 31; ECF No. 13, Plaintiff’s Response to Motion to Dismiss, pp. 8-
22 9.)
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1 Plaintiff cites no authority for the proposition that plaintiff may be excused from this
2 statutory provision and the Court is not inclined to imply a defense that is not included
3 specifically in the statute or otherwise applied by the courts to this statute. Therefore,
4 defendant's motion to dismiss this cause of action will be GRANTED without prejudice. In the
5 event that plaintiff can plead or prove that she provided the statutorily required notice and that
6 defendant failed to respond, then plaintiff may amend her complaint in the future or bring a
7 separate lawsuit.

8 D. Intentional/reckless infliction of severe emotional distress or "outrage."

9 Defendant correctly points out the elements of a cause of action for intentional infliction
10 of severe emotional distress. Plaintiff must allege: "(1) extreme and outrageous conduct; (2)
11 intentional or reckless infliction of emotional distress; and (3) actual result to plaintiff of severe
12 emotional distress." Kloepfel v. Boker, 149 Wn.2d 192, 195-96, 66 P.3d 630 (2003) (citations
13 omitted). This tort also is synonymous with the tort of "outrage." Id. This claim, according to
14 the Washington Supreme Court, must be predicated on behavior "so outrageous in character, and
15 so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
16 atrocious and utterly intolerable in a civilized community." Grimsby v. Samson, 85 Wn.2d 52,
17 59, 530 P.2d 291, 295 (1975) (*quoting* Restatement 2d of Torts § 46, comment d) (italics
18 omitted). This cause of action is reserved for the most extreme of circumstances, such as forcing
19 a plaintiff to witness the pain and suffering of his spouse while she died (*id.* at 60), or threatening
20 to kill a victim if she continued to carry on a romantic relationship with anyone else, Kloepfel,
21 *supra*, 149 Wn.2d at 194-95. The cause of action "does not extend to mere insult, indignities,
22 threats, annoyances, petty oppressions, or other trivialities." Grimsby, *supra*, 85 Wn.2d at 59,
23 530 P.2d at 259 (*quoting* Restatement 2d of Torts § 46, comment d).

1 The Washington State Supreme Court has set a high bar for what constitutes extreme and
2 outrageous conduct. For instance, a claim that county employees displayed photographs of
3 deceased relatives was not extreme and outrageous conduct. See Reed v. Pierce County, 136
4 Wn.2d 195, 203-04, 961 P.2d 333, 337 (1998). Nor is it sufficient to allege that parents suffered
5 from the tort of outrage when their children who had been left temporarily at home without a
6 babysitter were removed from the home by CPS workers. Spurrell v. Bloch, 40 Wn. App. 854,
7 858-59, 702 P.2d 529 (Wash. App. 1985).

8 The question of whether or not a defendant's conduct is sufficiently outrageous is
9 reserved for a jury only if the trial court initially determines that reasonable minds could differ
10 regarding whether the nature of the conduct could amount to the tort of outrage. Robel v.
11 Roundup Corp., 148 Wash. 2d 35, 51, 59 P.3d 611 (2002) (citation omitted). In one case decided
12 in the Western District of Washington, Doscher v. Swift Transp. Co., 2009 U.S. Dist. LEXIS
13 112184 at *5-*7 (W.D. Wash. 2009) (RJB) (unpublished opinion), the court denied a motion to
14 reconsider its granting of a motion to dismiss a claim involving a similar bureaucratic nightmare
15 as alleged by plaintiff here. The court held that even bad business decisions that may have had
16 disastrous effects on the plaintiff did not rise to a level of unacceptable behavior equal to
17 “outrageous” conduct, as the court has defined that cause of action. Id. at 6.

18 Here, plaintiff has alleged that she made a number of telephone calls and wrote letters
19 and that defendant failed to respond to her numerous inquiries and that as a result, she suffered
20 “severe emotional distress.” (ECF No. 8 at ¶¶ 9-10, 19, 34-38.) This is insufficient, without
21 more, to support a claim of outrage. Therefore, the Court GRANTS defendant’s motion to
22 dismiss without prejudice. In the event plaintiff can allege sufficient facts to meet the very high
23 legal standard, then the Court will consider allowing amendment of the complaint.
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1 E. Violation of the Real Estate Settlement Practices Act ("RESPA").

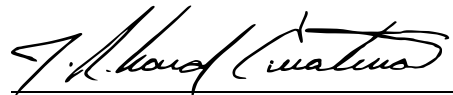
2 Defendant asserts that plaintiff has failed to state a claim under the Real Estate Settlement
3 Practices Act, 12 U.S.C. § 2605 ("RESPA"). Defendant claims that plaintiff failed to allege that
4 she sent a Qualified Written Request ("QWR") that included specific reasons that the account
5 was in error (ECF No. 10, p. 8) and that her first amended complaint was inconsistent with the
6 plaintiff's original complaint (*id.* at 9). Defendant also complains that plaintiff has not pled
7 specific dates as to when the QWR allegedly was sent to defendant.

8 Plaintiff is not required to prove her case in order to defeat a motion to dismiss and a
9 motion to dismiss should not be used as a discovery device. Plaintiff has alleged that she sent
10 several QWRs to defendant and that defendant failed to respond (ECF No. 8, First Amended
11 Complaint, ¶40). These allegations are sufficient and, no doubt, will be the subject of additional
12 discovery. Defendant's motion to dismiss this cause of action is DENIED.

13 CONCLUSION

14 In summary, defendant's motion to dismiss is GRANTED without prejudice as to
15 plaintiff's third cause of action for alleged violation of the Fair Credit Reporting Act and
16 plaintiff's fourth cause of action for intentional infliction of emotional distress. In all other
17 respects, defendant's motion to dismiss is DENIED.

18 Dated this 29th day of February, 2012.

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20 J. Richard Creatura
21 United States Magistrate Judge
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